

ZOOM IN

The question:

The Israeli military justice system and international law

*Introduced by Mariagiulia Giuffré, Peter Langford, Triestino Mariniello **

Military occupation exists within, and is regulated by, a substantive body of norms of international law. The questions of international law which arise from state military occupation are of enduring significance in relation to the form and extent of the legal regulation of this state practice. Beyond the initial stage of forcible military occupation and control of a particular territory, the body of international legal norms extends to the installation and operation of military courts during the subsequent period of occupation of the territory.

The military occupation of Palestinian territories by the state of Israel represents, due to its duration, an exemplary terrain upon which to reflect on the state practice of military occupation. The present Zoom-in purports to engage in a critical analysis of military justice systems commencing from the military justice system in operation in Israel. It draws from a discussion which took place at the Bluecoat in Liverpool on 16 September 2016 and was structured as a four-panel workshop. The editors gathered together academics and practitioners to tackle from different perspectives the Israeli military justice system, with a focus on law and practice related to administrative detention. In particular, the workshop aimed to critically assess whether the use of administrative detention by Israeli military courts in the Occupied Palestinian territories violate restrictions provided by international law. In this respect, it aimed to place into question the concept of administrative detention, and to examine its compatibility with international human rights law, international humanitarian law, and international criminal law. The

* Senior Lecturers in Law, Department of Law and Criminology, Edge Hill University, UK.

present Zoom-in focuses on issues which have been discussed within the Workshop's panel I, entitled 'Questioning the Israeli Military Justice System: A Human Rights Perspective'.

The specific focus of the contributions by Valentina Azarova and Luigi Daniele concerns the questions of international law which emerge from the administration of military justice within the Israeli Occupied Territories. Azarova's analysis centres upon the limited legal consideration of the intentions that orient Israel's practices, policies and institutional structures in the Occupied Palestinian territories. It utilizes Hart's conception of the pathology of legal systems to assess Israel's administration of justice in the Occupied Palestinian territories, thereby furnishing a normative perspective on the means and ends of a state's relationship to international law. The contribution examines the posture of Israel's legal system towards international law in order to provide a distinct normative perspective on the thick background rules of Israel's internationally unlawful acts. It analyses the assumptions underlying the operation of its administration of justice in the Occupied Territories, and explores how the systemic denial of Palestinians' rights is based on the rejection of Palestinian sovereignty over the territory Israel occupies. This normative perspective establishes a legitimate basis for the consideration that Israel is not applying international law in good faith nor capable of doing so, given the mandates of its domestic legal order. The review of Israeli practices as manifestations of a legal pathology concludes with reflections on the wider pertinence of this analytical category, particularly for the determination of the nature of state responsibility in international law.

Daniele commences from the sources of the Israeli system in which legislative, executive and judiciary prerogatives are entrusted to the military. From this, the examination proceeds to investigate the substantive law of the military justice system emphasising its disparity in comparison with Israeli domestic law, and its impact on the human rights of the Palestinian population. The effect of this disparity reveals an incompatibility not only with international law, but – more profoundly – with the fundamental principles which delimit the legal order of liberal-democratic models of justice governed by the rule of law. The incompatibility reflects a wider discordance between the Israeli project of permanent territorial control pursued in the West Bank and the international legal principles governing occupation: non-acquisition of



sovereignty, duties to administer the occupied territory for the benefit of the local population, and non-permanence. Thus, the shape of this military justice system of occupation – as a legal regime of exception *par excellence* – legitimizes and protects through penal sanctions the implementation of an illegal project. The paper concludes by insisting upon the reorientation of legal analysis to delineate the paths toward the end of the occupation and the military court system, which as judicial arm of a protracted *jus in bello/jus ad bellum* violation, offers a semblance of legality whilst simultaneously obstructing victims' access to justice.